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Recent Developments: B.N. v. K.K.: Fraud, Intentional Infliction of Emotional Distress, and Negligence Applicable When Resulting from Sexual Transmissions of Dangerous, Contagious and Incurable Disease

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observations. *Id.* Thus, the Court concluded that in Greenwood's case, an expectation of privacy in trash left on a public street did not deserve protection from police warrantless searches and seizures as an expectation society was prepared to honor. *Id.*

Rather, than conclude that Greenwood's expectation had been frustrated, the Court relied on the unanimous rejection of similar claims by the Federal Courts of Appeal. In each of these cases, the courts found that a reasonable expectation of privacy did not exist with respect to trash discarded outside the home and the curtilage thereof, thus being accessible to warrantless searches and seizures. *Id.* [Citations omitted.]

On the issue of whether an expectation of privacy in garbage should be deemed reasonable as a matter of federal law when the warrantless search and seizure of garbage is impermissible as a matter of state law, the majority stated that state law may impose more stringent constraints in police conduct involving searches than federal law. *Id.* at 1630. However, the Court declared that "there is no such understanding with respect to garbage left for collection at the side of a public street." *Id.* at 1630-31.

Finally, the Court noted that evidence obtained in violation of state law need not be suppressed within the scope of the fourth amendment exclusionary rule when the benefits of deterring police misconduct do not outweigh the costs of excluding reliable evidence of criminal activity. *Id.* at 1631. Since the state may eliminate the exclusionary rule as a remendy for violations of that right, the majority held that it may also adopt a similar balancing approach in concluding that "the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when police conduct at issue does not violate federal law." *Id.* Therefore, the Court found no merit in Greenwood's argument that because California eliminated the exclusionary rule for evidence seized in violation of state, but not federal law, the state violated the Due Process Clause of the fourteenth amendment. *Id.*

Justice Brennan, with Justice Marshall, dissented. Brennan opined that individuals have the reasonable expectation that the aspects of their private lives are concealed safely in a trash bag free from examination and inspection wherever they may be as long as the contents are not in "plain view," thus enjoying protection under the fourth amendment. *Id.* at 1633. In concluding that an expectation of privacy attaches to any container unless "it so clearly announces its contents," the dissent argued that trash bags are to be afforded fourth amendment protection. Citing *Robbins v. California*, 453 U.S. 420 (1981), Brennan contended:

> [E]ven if one wished to import such a distinction into the fourth amendment, it is difficult if not impossible to perceive any objective criteria by which that task might be accomplished. What one person may put into a suitcase, another may put into a paper bag...And...no court, no constable, no citizen, can sensibly be asked to distinguish the relative "privacy interests" in a closed suitcase, briefcase, portfolio, duffle bag, or box.

Id. at 426-27, quoted in *California v. Greenwood*, at 1632.

The dissent found the majority's analysis to be unpersuasive on the theory that trash is abandoned and therefore not entitled to an expectation of privacy. Brennan explained that an expectation of privacy cannot be negated when a person seeks to preserve as private the disposal of refuge. *Greenwood*, 108 S.Ct. at 1637. He reasoned that the voluntary relinquishment of possession or control over an item does not lose fourth amendment protection, even if placed in a mailbox, and therefore the possibility of such an intrusion by third parties should not justify a warrantless search by police. Thus, as viewed by Brennan and Marshall, it was unreasonable for the majority to have concluded that Greenwood had no expectation of privacy in his trash. To hold that the warrantless search of disposed trash was consistent with the fourth amendment, the court "paints a grim picture of our society." *Id.* at 1636-37.

In *Greenwood*, the Court failed to address whether the curtilage question should be resolved with particular reference to the proximity of the area claimed to be "curtilage" to the home. Additionally, the Court did not give effect to the fact that trash bags used by Greenwood were opaque and not in "plain view," a factor generally recognized as constituting items free from police warrantless searches and seizures under the fourth amendment.

While the Court rejected the notion that an expectation of privacy may not extend to garbage placed on a public street, and that its contents may be seized without a warrant, it necessarily follows that persons engaged in noncriminal activity will no longer be able to dwell in reasonable security and freedom from surveillance, as such is an expectation no longer protected by the courts as one society now honors.

—Gloria S. Wilson

B.N. v. K.K.: FRAUD, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND NEGLIGENCE APPLICABLE WHEN RESULTING FROM SEXUAL TRANSMISSIONS OF DANGEROUS, CONTAGIOUS AND INCURABLE DISEASE

In *B.N. v. K.K.*, 312 Md. 135, 538 A.2d 1175 (1988), the Court of Appeals of Maryland, in a case certified by the United States District Court for the District of Maryland, held that Maryland does recognize causes of action for fraud, intentional infliction of emotional distress and negligence, resulting from the sexual transmission of a dangerous, contagious, and incurable disease, such as genital herpes. Each named cause of action, however, is subject to the proper factual showing by the plaintiff and any defense raised by the defendant.

Ms. N. was employed as a nurse at Johns Hopkins Hospital in Baltimore, Maryland, between July and December, 1983. Dr. K. also worked at Hopkins Hospital for part of that period. From July through Ocotber, 1983, Ms. N. and Dr. K. "were involved in an intimate boyfriend-girlfriend relationship" and "engaged in acts of sexual intercourse." *Id.* at 138, 538 A.2d at 1177. While this was going on, Dr. K. knew he had genital herpes, but did not disclose this to Ms. N., who neither knew nor had any reason to believe that Dr. K. was a carrier of genital herpes. *Id.* On or about October 1, 1983, Ms. N. and Dr. K. engaged in sexual intercourse. On that date Dr. K. knew that his disease was active and would probably be transmitted to Ms. N. through sexual intercourse. That result in fact occurred and was caused by Dr. K.'s conduct, inasmuch as Ms. N. never engaged in sexual contact with anyone but Dr. K. during the relevant period. *Id.* at 138-9, 538 A.2d at 1177.

Ms. N. brought suit against Dr. K. in the United States District Court for the District of Maryland, alleging fraud, intentional infliction of emotional distress, negligence and assault and battery. The case was then certified to the Court of Appeals of Maryland by the U.S. District Court pursuant to the Maryland Uniform Certification of Questions of Law Act, Md. Cts. & Jud. Proc. Code Ann., §§12-601 through 12-609 (1984 Repl. Vol.).

The question certified asked:

> Does Maryland Recognize A Cause Of Action For Either Fraud, Intentional Infliction of Emotional Distress, Or Negligence Resulting From the Sexual Transmission Of A Dangerous, Contagious, and Incurable Disease, Such As Genital Herpes?

Id. at 138, 538 A.2d at 1176. The certification order by the federal court instructed the court of appeals that:

> The sufficiency of the Plaintiff's Complaint regarding the allegations of the elements of each tort is not part of the certified question. The Court of Appeals is asked to assume the sufficiency of each Count of the Complaint as plead by the Plaintiff [Ms. N.], the facts are those facts alleged by the complainant in support of her causes of action.

Id.

To begin its analysis, the court stated the traditional elements of a cause of action in negligence:

> 1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
> 2. A failure on the person's part to conform to the standard required: a breach of the duty...;
> 3. A reasonably close causal connection between the conduct and the resulting injury...;
> 4. Actual loss or damage resulting to the interests of another....

Id. at 141, 538 A.2d at 1178.

The notion of duty is founded on the "responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others." *Id.* (citing *Morgan v. Faberge,* 273 Md. 538, 543, 332 A.2d 11, 15 (1975)). Furthermore, "[w]hen a reasonable person knows or should have known that certain types of conduct constitute an unreasonable risk of harm to another, he or she has the duty to refrain from that conduct." *Id.* (citing *McLance v. Lindau,* 63 Md. App. 504, 514, 492 A.2d 1352, 1358 (1985)). Moreover,

> [o]ne who knows he or she has a highly infectious disease can readily forsee the danger that the disease may be communicated to others with whom the infected person comes in contact. As a consequence, the infected person has a duty to take reasonable precautions — whether by warning others or by avoiding contact with them — to avoid transmitting the disease.

Id. at 142, 538 A.2d at 1179.

Referring to the case at bar, it was alleged that Dr. K. knew he had active genital herpes, a highly contagious, sexually transmitted disease, that he had intercourse with Ms. N., and as a result, Ms. N. contracted a serious, painful, and incurable disease. The Court of Appeals of Maryland held that if the averments of Ms. N's complaint are believed, she has stated a cause of action in negligence that is cognizable under Maryland law. *Id.* at 143, 538 A.2d 1179.

The next cause of action examined was intentional infliction of emotional distress. The court noted that the independent tort of intentional infliction of emotional distress is sanctioned in Maryland. The four elements of the tort as identified in *Harris v. Jones,* 281 Md. 560, 566, 380 A.2d 611, 614 (1977) are:

> 1) The conduct must be intentional or reckless;
> 2) The conduct must be extreme and outrageous;
> 3) There must be a causal connection between the wrongful conduct and the emotional distress;
> 4) The emotional distress must be severe.

Id. at 144, 538 A.2d at 1179-80.

One does not actually have to intend to inflict severe emotional distress. It is enough if "he knew that such distress was certain, or substantially certain, to result from his conduct; or where he acted recklessly in deliberate disregard of a high degree of probability that the emotional distress would follow." *Id.*

> [O]ne who knowingly engages in conduct that is highly likely to infect another with an incurable disease of this nature, and who also is aware of the nature of the disease, not only engages in intentional or reckless conduct as those terms are defined in *Harris;* he or she has committed extreme and outrageous conduct.

Id. at 146, 538 A.2d at 1181. Thus, assuming proof of that conduct, the case easily crosses the "extreme and outrageous" threshold.

Turning to the severity of the emotional distress, while it must be severe, the distress need not produce total emotional or physical disablement. Rather, the severity must be measured in light of the outrageousness of the conduct and the other elements of the tort. *Id.* at 148, 538 A.2d 1182. (citing *Reagan v. Rider,* 70 Md. App. at 511, 521 A.2d at 1250).

The court of appeals held that proof of the acts of Dr. K. establish the first three elements of the tort under Maryland law, and if sufficient emotional distress has been produced by that conduct, in light of all the evidence, Ms. N. is entitled to recover damages. *Id.* at 148-9, 538 A.2d at 1182.

The last cause of action which the Court of Appeals of Maryland viewed was fraud. The elements of fraud are:

> 1) that a representation made by a party was false; 2) that either its falsity was known to that party or the misrepresentation was made with such reckless indifference to truth to impute knowledge to him; 3) that the misrepresentation was made for the purpose of defrauding some other person; 4) that that person not only relied upon the misrepresentation but had the right to rely upon it with full belief of its truth, and that he would not have done the thing from which damage resulted if it had not been made; and 5) that the person suffered damage directly resulting from the misrepresentation.

Id. at 149, 523 A.2d at 1182 (citing *Suburban Mgmt. v. Johnson,* 236 Md. 455, 460, 204 A.2d 326, 329 (1964)). One who by a fraudulent misrepresentation or nondisclosure of a fact that it is his duty to disclose causes physical harm to the person...of another, who justifiably relies upon the misrepresentation, is subject to liability to the other. *Id.* at 150, 538 A.2d at 1182. This principal has been applied in *Kathleen K. v. Robert B.,* 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984), a case whose facts are very similar to those alleged in this case, except here the charge is that Dr. K. concealed the existence of genital herpes, rather than asserting that he was free of disease. Dr. K. attempted to distinguish this case from *Kathleen K.* because here there was no affirmative representation as to his good health. However, the court stated that if there is a duty to speak, the concealment can result in liability to the same extent that an actual denial of the existence of the fact would. *B.N.* at 151, 538 A.2d at 1184.

Based upon the implicit misrepresentation being material and Ms. N.'s assertions that she never would have engaged in sex with Dr. K. had she known the truth and that she suffered damage directly from the misrepresentation, the court held that Ms. N. stated a cause of action for fraud that is recognized in Maryland. *Id.* at 153, 538 A.2d 1184.

By answering the certified question in the affirmative, the Court of Appeals of Maryland has clearly established that the causes of action of negligence, intentional infliction of emotional distress and fraud

will be recognized, when they result from the sexual transmission of a dangerous, contagious and incurable disease. However, the plaintiff must make the requisite factual showing of each element in every case.

—Jonathan S. Beiser

Comptroller Of The Treasury Income Tax Division v. American Satellite Corporation: **OUT-OF-STATE LOSSES SUFFERED BY MULTI-STATE CORPORATION MAY BE USED TO OFFSET IN-STATE CAPITAL GAINS FOR TAX PURPOSES**

In *Comptroller Of The Treasury Income Tax Division v. American Satellite Corporation,* 312 Md. 537, 540 A.2d 1146 (1988), the Court of Appeals of Maryland held that out-of-state losses, suffered by a multi-state corporation reporting no federal taxable income, may offset in-state capital gains allocable to Maryland under Md. Ann. Code art. 81 § 316(b)(3) (1957, 1980 Repl. Vol.). The court of appeals determined that a corporation must have a "net income" as defined in Md. Ann. Code art. 81, § 280A(a) (1957, 1980 Repl. Vol.) before § 316(b) comes into play.

Section 280A(a) provides that the "net income" of a corporation is its taxable income as defined in the laws of the United States, thus equivalent to its federal taxable income. Sections 280A(b) and (c) provide items which are added to, or subtracted from, a corporation's federal taxable income to determine its final "net income." Section 316(b) provides the means of allocating the "net income" of multi-state corporations between Maryland and other states where the corporation does business.

The Comptroller of the Treasury made an assessment of $252,786.36 against American Satellite Corporation (ASC) for a claimed deficiency from a $5,000,000 intangible capital gain that ASC realized in 1982. This gain was allocable to Maryland under § 316(b)(3), which provided that a corporation's capital gains and losses from sales of intangible personal property were allocable to Maryland if the corporation had its domicile in Maryland. At the time of the Comptroller's assessment in 1982, ASC's domicile was Maryland (this situs allocation provision of 316(a) and (b) was repealed in 1984).

In 1982, ASC filed a consolidated federal tax return with Fairchild Industries, its parent company. If ASC had filed a separate tax return, as required by Md. Ann. Code art. 81, § 295, its federal taxable income for 1982 would have been $1,437,808. However, ASC had net operating losses carried over from previous years that amounted to $51,687,594. These net operating losses completely offset ASC's federal taxable income for 1982, thus reducing its income to zero. Consequently, ASC asserted that it had no "net income" under § 280A(a) and showed no taxable income on its Maryland return. Later, ASC acknowledged that it did owe $14,229 as Maryland taxable income for state and local income taxes as required by § 280A(b), and for personal property taxes as required by Md. Ann. Code art. 81, § 288(g) (1957, 1980 Repl. Vol.).

The Comptroller, however, determined that ASC owed $252,786.36 in taxes. He arrived at this number by apportioning ASC's net operating losses to only $1,297,452, instead of the $51,687,594 that ASC claimed. The Comptroller arrived at the smaller number by making the following calculations: (1) he took the $14,229 (zero federal taxable income plus the § 280A(b) and § 288(g) modifications); (2) he subtracted the $5,000,000 capital gain, subject to 100% situs allocation under § 316(b)(3), from the $14,229 (allocable items are 100% taxable to Maryland and should not be apportioned); (3) this resulted in $-4,985,771; (4) he multiplied this number by the three-factor apportionment fraction of .260231 (this comes from a formula which takes into account property, payroll and sales, which are operations subject to apportionment) under § 316(c), which equalled $-1,297,452; (5) then he added back the $5,000,000 allocated capital gain not subject to apportionment; (6) which left $3,702,548 as Maryland taxable income; (7) which was multiplied by the 7% tax rate provided for under § 288; (8) which totalled $259,178.36; (9) from which $6,392.00 was subtracted as governed by § 288(g); this left a final tax owed of $252,786.36.

The Comptroller's view was that § 316(b)(3) worked in the same manner as § § 280A(b) and (c), that is, to modify the federal taxable base. He supported his position by arguing that when the statute is read as a whole, the words "[E]xcept as hereinafter modified" from § 280A(a), included the provisions of § 316(b)(3) as additions to taxable base. Thus, the Comptroller's position was that capital gains were allocable to Maryland under § 316(b)(3) if the taxpayer's domicile was Maryland. Since out-of-state profits were not taxable in Maryland, the Comptroller felt that out-of-state losses should not be used to offset Maryland capital gains. Therefore, he determined that even though ASC had no "net income" for federal tax purposes, ASC's capital gain would be subject to Maryland income tax.

On April 16, 1986, the Maryland Tax Court ordered the assessment of the Comptroller to be reversed. The tax court felt that § 316 modifications arise only "when a corporation has net income as defined under § 280A." *Comptroller Of The Treasury Income Tax Division v. American Satellite Corporation,* ___ Md. ___,